Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBERTSON-CECO CORP.,

Cross-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the majority below err in failing to limit the time period during which the district court should examine a defendant's contacts with the forum to the year during which suit was filed?

INTERESTED PARTIES

The Petitioner is Metropolitan Life Insurance Company.

The Respondent/Cross-Petitioner is Robertson-Ceco Corporation.

United Dominion Industries, Inc. was dismissed by summary judgment on March 4, 1995, and was not a party to the appeal below, nor is it an interested party to these proceedings.

There is no parent company to the Respondent/Cross-Petitioner and other than wholly owned subsidiaries, it has no subsidiaries.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent requests the Court to grant its conditional cross-petition for a writ of certiorari if it grants the Petitioner's request for a writ. The opinions below and statement of the case are set out in Respondent's Brief in Opposition. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition.)

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. (App. 1a.) The jurisdiction of this Court is invoked in the Petition For A Writ Of Certiorari under 28 U.S.C. § 1254(1). The Petition For A Writ Of Certiorari was placed on the docket on August 22, 1996. Respondent expressly relies on Supreme Court Rule 12.5 in filing this Conditional Cross-Petition For A Writ Of Certiorari.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. CERTIORARI SHOULD BE GRANTED TO PROVIDE GUIDANCE AS TO THE PROPER TIME PERIOD FOR ASSESSMENT OF DEFENDANT'S CONTACTS WITH THE FORUM STATE IN THE MINIMUM CONTACTS ANALYSIS OF ANY *IN PERSONAM* JURISDICTION INQUIRY

Certiorari should be granted because the opinion below failed to limit the period during which it assessed

Robertson's contacts with Vermont to the year the plaintiff filed suit in violation of due process limitations on the exercise of personal jurisdiction over the defendant. The opinion below held:

> In general jurisdiction cases, district courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances – up to and including the date the suit was filed – to assess whether they satisfy the "continuous and systematic" standard. The determination of what period is reasonable in the context of each case should be left to the court's discretion.[1]

App. 15a-16a.

The majority observed that few cases specifically discuss the appropriate time period for assessing whether a defendant's contacts with the forum state are sufficient for the purposes of exercising jurisdiction. The majority went on to consider that this Court looked at a seven-year period in *Helicopteros* and other circuit courts have likewise considered multi-year periods for assessing minimum contacts. None of those cases, however, specifically analyzed the appropriate time period for the jurisdictional inquiry of minimum contacts. Because this Court's

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[1] Having announced this rule, the court improperly reverses the trial judge because it failed to find that he abused his discretion in limiting the minimum contacts inquiry to the year 1993. Thus, alternatively, certiorari should be granted to provide direction on the appropriate analysis of the minimum contacts time period as a matter left to the discretion of the trial judge or tied to some other consideration calculated to make sure that due process fairness owed a defendant is met.

opinions are silent on the subject and it affects substantial due process rights of a defendant, certiorari should be granted.

This Court's analysis of a defendant's minimum contacts with the forum state is intimately tied to the notion that defendants may purposefully structure those contacts so as to create or frustrate jurisdiction. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California* this Court held "[t]he 'substantial connection,' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by **an action of the defendant purposefully directed toward the forum state.**" 480 U.S. 102, 112 (1987). (Emphasis in original), (citations omitted). See also *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("when a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumer, or if the risks are too great, severing its connection with the State").

This Court also has recognized that the due process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that contact will and will not render them liable to suit . . . " *Id.* This Court also has suggested that "foreseeability" is relevant to due process protections of a defendant in a jurisdictional analysis: "t[h]e foreseeability that is critical to the due process analysis . . . is that the defendant's conduct in connection with the forum State is such that he should reasonably anticipate being haled into court there." *Id.* See also *Hanson v. Denkla*, 357 U.S.

235, 253 (1958) (" . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.")

The foregoing cases demonstrate this Court's recognition that a defendant's contacts with a forum must be intentional and form the basis for orderly planning around potential liability. Implicit to this analysis has to be the recognition that a defendant, over time, may change its conduct in response to those concerns about potential liability. Likewise, the constitutional limits of the exercise of *in personam* over such a defendant would change, over time, as the defendant's conduct with respect to the forum changed. Accordingly, a year period during which suit is filed is the appropriate period for minimum contacts to be assessed or else the burden on the defendant, the central due process concern in all personal jurisdiction cases, may become intolerable.

For example, a California corporation which maintains a branch office in Vermont faces much less burden in defending a suit in Vermont than it would after it had closed its office and left the state entirely or substantially reduced its contacts with the state. The corporation which, as a matter of avoiding potential liability, tailors its business plan to eradicate or limit its contacts with a state is entitled to the 'predictability' and 'reasonable foreseeability' of exposure to litigation in a foreign jurisdiction that this Court repeatedly notes in its jurisdictional analysis. Especially with regard to 'general' jurisdiction exposure, this Court needs to clarify the rule as to the time period during which minimum contacts may be assessed or else the most important function of

that test – that the absence of minimum contacts forecloses the jurisdiction analysis prior to any reasonableness inquiry – will be lost to jurisdictional analysis and to a defendant's ability to control its liability exposure.

Although the coincidental or intentional absence of a defendant from a state both serve to limit if not eradicate the defendant's contacts with the state, neither situation is appropriate to the exercise of jurisdiction since there are no minimum contacts. For the defendant which intentionally or unintentionally substantially withdraws from contacts with a state, it is equally predictable that it should not reasonably anticipate being haled into court there, after all, it has no contacts with the state. Thus, this Court must grant certiorari to offer guidance to the circuit courts on the appropriate time period during which a defendant's contacts with a forum state should be considered. The fundamental fairness to defendants protected by the due process clause is implicated in a case such as this where a defendant's year to year contacts with a forum vary widely thus leaving some years where the anticipation of being called to suit is reasonable and other years where it is not.

CONCLUSION

For the foregoing reasons, the Conditional Cross-Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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